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CAUGHT IN A WEB OF LIES: USE OF PRIOR INCONSISTENT STATEMENTS TO IMPEACH WITNESSES BEFORE THE ICTY

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Abstract: Trial attorneys around the world face the problem of how to confront a witness whose live testimony contradicts his prior statements. U.S. prosecutors take refuge under Federal Rule of Evidence 613 and the *Harris* doctrine, which permit inadmissible hearsay and illegally obtained statements to be used to impeach a witness's live testimony. No similar rule aids prosecutors at the International Criminal Tribunal for the Former Yugoslavia (ICTY). Recent divergent decisions regarding the use of inconsistent statements for impeachment purposes have left ICTY prosecutors struggling to prove cases against the most heinous criminals in history. This Note argues that the ICTY should adopt a new evidentiary rule akin to the United States' Rule 613 and the *Harris* doctrine. Adoption of a new rule would more efficiently balance the prosecutor's duty to prove the case against the accused's right not to be convicted by otherwise inadmissible evidence.

> *The question is whether you were lying then or are you lying now . . . or whether in fact you are a habitual and compulsive liar!*
>
> —Agatha Christie's *Witness for the Prosecution*

Introduction

With the dramatic flair that only movies can muster, Agatha Christie's character Sir Wilfrid Robarts highlights a classic problem facing trial attorneys: how does an attorney confront a witness whose live testimony contradicts his prior statements?[1]

U.S. prosecutors take for granted the evidentiary proposition that inadmissible hearsay and illegally obtained statements are always available to impeach a witness's live testimony should he weave a web of lies

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[1] Witness for the Prosecution (MGM 1957).

on the stand.[2] In stark contrast, the use of prior inconsistent statements for impeachment purposes before the International Criminal Tribunal for the Former Yugoslavia (ICTY) varies from case to case.[3] In an international criminal system, where there are few evidentiary rules and little precedent to draw on, these divergent decisions leave ICTY prosecutors struggling to prove cases against the most heinous criminals in history.[4]

Part I of this Note focuses on both the development of the ICTY's *Rules of Procedure and Evidence* and the particular rules governing the admission of evidence at trial. Part II examines particular examples of the admission of prior inconsistent statements before the ICTY, common law courts, and civil law courts. Part III argues that the ICTY should adopt the logic of U.S. courts and codify a rule allowing otherwise inadmissible evidence to be used for impeachment purposes.

I. Background

A. *Establishment of the ICTY's Rules of Evidence and Procedure*

The ICTY opened its doors in 1993 as an ad-hoc court and body of the United Nations (U.N.) designed to try crimes committed in the territory of the former Yugoslavia.[5] The ICTY exercises jurisdiction over

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[2] *See generally* Fed. R. Evid. 613 (authorizing impeachment by prior inconsistent statements, even if statement is otherwise inadmissible hearsay); Harris v. New York, 401 U.S. 222 (1971) (allowing impeachment by prior inconsistent statements, even if statement was obtained in violation of witness's constitutional rights).

[3] *Compare* Prosecutor v. Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 33 (Oct. 9, 2006) (allowing use of prior inconsistent statements for impeachment), *with* Prosecutor v. Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, ¶ 8 (Mar. 11, 2003) (refusing to admit prior inconsistent statements for impeachment).

[4] Gideon Boas, *Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility,* 12 Crim. L.F. 41, 41–42 (2001).

[5] *See* S.C. Res. 827, ¶¶ 6–7, U.N. Doc. S/RES/827 (May 25, 1993) (establishing an international tribunal); S.C. Res. 808, ¶ 9, U.N. Doc. S/RES/808 (Feb. 22, 1993) (deciding, in principle, to form an international criminal tribunal to address crimes that occurred in former Yugoslavia). The exigent need for an international criminal tribunal was apparent in the spirited speeches given before the U.N. Security Council. Ambassador Madeline Albright proclaimed:

> There is an echo in this Chamber today. . . . We have preserved the long-neglected compact made by the community of civilized nations [forty-eight] years ago in San Francisco to create the United Nations and enforce the Nuremberg Principles. The lesson that we are all accountable to international law may have finally taken hold in our collective memory. This will be no victor's tribunal. The only victor that will prevail in this endeavor is the truth.

individuals responsible for violations of the 1949 Geneva Conventions, violations of the law of war or genocide, and other crimes against humanity.[6] To achieve this task, the U.N. Security Council left the arrangement of all practical details to the U.N. Secretary-General.[7]

Recognizing that little precedent existed regarding the day-to-day operation of an international criminal tribunal, the Secretary-General concluded that "the judges of the International Tribunal as a whole should draft and adopt rules of procedure and evidence."[8] Two months of drafting gave rise to the *Rules of Procedure and Evidence* (*Rules*).[9] This document, in just 125 rules, outlined the procedural framework including investigatory procedures; pre-trial, trial, and appellate proceedings; sentencing; and all rules of evidence.[10]

The simplicity of the *Rules* is rooted in the historical purpose and development of the ICTY.[11] The ICTY embraces the straightforward goal of "ensur[ing] that a trial is fair and expeditious . . . with full respect for the rights of the accused and due regard for the protection of victims and witnesses."[12] Flexible procedures give the Trial Chamber discretion to decide what is in the best interest of the accused on a case-by-case basis.[13] The ICTY also represents an attempt to integrate the civil

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U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/PV.3175 (Feb. 22, 1993), *reprinted in* 2 Virginia Morris & Michael P. Scharf, An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia 165 (1995).

[6] Statute of the International Tribunal, 32 I.L.M. 1192, *available at* http://www.icls.de/dokumente/icty_statut.pdf, *adopted by* S.C. Res. 827, *supra* note 5 [hereinafter ICTY Statute].

[7] S.C. Res. 827, *supra* note 5, ¶ 8.

[8] The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 83, U.N. Doc. S/25704 (May 3, 1993), *reprinted in* Morris & Scharf, *supra* note 5, at 19.

[9] Michael P. Scharf, Balkan Justice 67 (1997).

[10] Int'l Criminal Trib. for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, *Rules of Procedure and Evidence,* ICTY Doc. IT/32/Rev.3 (Feb. 6, 1995), *reprinted in* ABA, Report on the Proposed Rules of Procedure and Evidence of the International Tribunal to Adjudicate War Crimes in the Former Yugoslavia 4–54 (Karen Tucker ed., 1995); *see also* Scharf, *supra* note 9, at 70 (noting that despite brevity of *Rules,* they represent a marked improvement over Nuremberg Tribunal's operating rules, which allowed for trials in absentia, denied defense counsel access to evidentiary archives, often compelled defendants into making incriminating statements against themselves, and prohibited appeals of adverse decisions).

[11] *See* S.C. Res. 827, *supra* note 5, ¶¶ 6–7; S.C. Res. 808, *supra* note 5, ¶ 9.

[12] ICTY Statute, *supra* note 6, art. 20(1).

[13] *See* Prosecutor v. Tadic, Case No. IT-94-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 23 (Aug. 10, 1995) ("A final indication of the uniqueness of the International Tribunal is that, as an ad hoc institution, the International Tribunal was able to mold its Rules and procedures to fit the task at hand.").

and common law heritages of all U.N. members.[14] The *Rules,* therefore, embody only those principles espoused by all member states.[15]

The judges drafting the *Rules* cleverly left the power to amend any and all procedural rules in their own hands.[16] The drafters were aware that, because the *Rules* were the first international code of criminal procedure, they would need to be adjusted to meet the practical needs of international criminal prosecution.[17] Amendment of a rule occurs when a judge, prosecutor, or registrar proposes a change, which garners support from ten of the sixteen permanent judges at the annual plenary meeting or obtains unanimous support of the permanent judges at any time.[18] The judges of the ICTY have embraced this power wholeheartedly as the *Rules* have been amended, on average, twice per year since their adoption in 1994.[19] Recent studies of the *Rules* note

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[14] *See* Prosecutor v. Delalić, Case No. IT-96–21-T, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landzo, ¶ 15 (May 1, 1997) ("[I]n formulating the rules, elements of both the civil and the common law systems capable of promoting justice were considered and adopted. . . . A Rule may have a common law or civilian origin but the final product may be an amalgam of both common law and civilian elements, so as to render it sui generis.").

[15] *See* The President of the International Tribunal, *First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991,* ¶ 53, *delivered to the Security Council and the General Assembly,* U.N. Doc. S/1994/1007, A/49/342 (Aug. 29, 1994), *available at* http://www.un.org/icty/rappannu-e/1994/index.htm [hereinafter *First Annual Report*] (noting that "only measures on which there is broad agreement have been adopted, thus reflecting concepts that are generally recognized as being fair and just in the international arena").

[16] *See* Int'l Criminal Trib. for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, *Rules of Procedure and Evidence,* Rule 6 (Amendment of the Rules), ICTY Doc. IT/32/Rev. 39 (Sept. 22, 2006), *available at* http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev38e.pdf [hereinafter R. P. & Evid.]; *see also* Gideon Boas, *A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY, in* International Criminal Law Developments in the Case Law of the ICTY 10 (Gideon Boas & William A. Schabas eds., 2003) ("Even though there are clearly times when the interpretative role of a judge exceeds the simple application of the law and may be perceived as a form of judicial legislating, generally the doctrine [of separation of powers] prevents any substantial interference of the judiciary on this task.").

[17] Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha,* 37 Colum. J. Transnat'l L. 725, 735 (1999).

[18] R. P. & Evid., *supra* note 16, at 6(A)–(B) (Amendment of the Rules). For a listing of the current make-up of the ICTY, see ICTY Key Figures, *available at* http://www.un.org/icty/glance/keyfig-e.htm (last visited May 12, 2008).

[19] *See* Boas, *supra* note 16, at 5 (explaining the remarkable number of amendments that have been made to *Rules* since their initial adoption).

that, between 2000 and 2001, ninety-one rules were amended, seven new rules were adopted, and one rule was deleted.[20]

B. *Admission of Evidence Under the ICTY's Rules*

Only two broad principles guide a judge's hand when admitting evidence before the ICTY: (1) Trial Chambers "may admit any relevant evidence which it deems to have probative value,"[21] and (2) "may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."[22] The simplicity of these provisions reflects that the common law's restrictive evidentiary rules stem from the need to control information presented to a lay jury.[23] As ICTY judges serve as the factfinder at trial, these skilled jurists can weigh the probative value of evidence without being "shielded from irrelevancies or given guidance as to the weight of the evidence they have heard."[24] The admission of evidence before the ICTY thus mirrors the inquisitorial model of civil law nations.[25]

Inherent in the determination of whether evidence is probative is the reliability of the evidence.[26] Although the Trial Chambers have refused to read an absolute requirement of reliability as a condition for admissibility, reliability is "the golden thread which runs through all components of admissibility."[27]

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[20] *Id.*

[21] R. P. & Evid., *supra* note 16, at 89(C) (General Provisions).

[22] *Id.* at 89(D) (General Provisions).

[23] *See First Annual Report*, *supra* note 15, ¶ 72 (remarking that there are no technical evidentiary rules because "[t]his Tribunal does not need to shackle itself to restrictive rules which have developed out of the ancient trial-by-jury system").

[24] *See id.*; *see also* Fed. Judicial Ctr., Manual For Complex Litigation (Fourth) § 11.431 (2004) (stating that judges are "accustomed to reviewing matters that may not be admissible").

[25] *See* Boas, *supra* note 4, at 48 (comparing ICTY's flexible approach to admission of evidence to principle of la liberté de la prevue present in French criminal law system, which allows a court to rule any form of evidence admissible).

[26] *See, e.g.,* Prosecutor v. Kordic, Case No. IT-95–14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, ¶¶ 23, 24, & 29 (July 21, 2000) (concluding that decedent's unsworn statement that had not been taken subject to cross-examination was unreliable and, therefore, inadmissible); Prosecutor v. Alexsovski, Case No. IT-95–14/1-AR73, Decision on the Prosecutor's Appeal on Admissibility of Evidence, ¶ 15 (Feb. 16, 1999) ("Trial Chambers have a broad discretion under Rule 89(C) to admit relevant hearsay evidence. Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose in the sense of being voluntary, truthful and trustworthy.").

[27] Prosecutor v. Delalić, Case No. IT-98–21-T, Decision on the Prosecution's Oral Request for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample, ¶ 32 (Jan. 19, 1998); *see* Wil-

1. Admission of Hearsay Evidence

The ICTY defines hearsay as "the statement of a person made otherwise than in the proceedings in which it is being tendered, but nevertheless being tendered in those proceedings in order to establish the truth of what the person says."[28] Hearsay statements are admissible against both parties if the statements are relevant and have probative value.[29] The *Rules* not only allow for the admission of hearsay evidence, but specifically call for the use of written statements in lieu of live testimony to expedite trials.[30]

Only when the need to ensure a fair trial outweighs the probative value will Rule 89(D) filter out hearsay statements.[31] The "golden thread" of reliability, therefore, weaves into this analysis because determinations regarding probative value require Trial Chambers to pay particular attention to the reliability of a statement including whether it was voluntary, truthful, and trustworthy.[32]

The adoption of this flexible approach to hearsay evidence reflects that, in legal systems around the world, "[t]he exclusion . . . of hearsay evidence is not grounded upon its intrinsic lack of probative value. It is ordinarily excluded because of the possible infirmities with respect to the observation, memory, narration, and veracity of him who utters the offered words."[33]

2. Admission of Evidence Obtained in Violation of the Rules

Evidence obtained in violation of the *Rules*' procedural safeguards is not automatically excluded because of the ICTY's flexible approach to the admission of evidence.[34] In *Prosecutor v. Brdjanin,* the Trial

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liam A. Schabas, The UN International Criminal Tribunals 456 (2006) (discussing importance of reliability in admission of evidence before ICTY).

[28] *Alexsovski,* Case No. IT-95–14/1-AR73, Decision on the Prosecutor's Appeal on Admissibility of Evidence, ¶ 14.

[29] *See id.* ¶ 15.

[30] R. P. & Evid., *supra* note 16, at 92 *bis* (Admission of Written Statements and Transcripts in Lieu of Oral Testimony).

[31] Boas, *supra* note 16, at 29 (explaining reasons why hearsay evidence will be excluded in trials before ICTY).

[32] Prosecutor v. Tadic, Case No. IT-94–1-T, Decision on the Defense Motion on Hearsay, ¶¶ 15–19 (Aug. 7, 1996), *quoted in* Boas, *supra* note 4, at 51–52.

[33] Int'l Military Trib. for the Far East, Judgment (July 25, 1946) (Pal, J., dissenting), *quoted in* May & Wierda, *supra* note 17, at 745.

[34] *See* R. P. & Evid., *supra* note 16, at 5(A) (Non-compliance with the Rules) ("When an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief if it finds that the alleged non-compliance has caused material prejudice to that party."); Prosecutor v.

Chamber noted that "drafters of the Rules specifically chose not to set out a rule providing for the automatic exclusion of evidence illegally or unlawfully obtained."[35] Instead, relevant and probative evidence is generally admissible unless it was "obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."[36]

The defense successfully invoked this exclusionary principle in *Prosecutor v. Delalić*.[37] There, the Trial Chamber excluded a confession that Austrian police obtained after hours of continuous interrogation, by five different officers, and repeated assertions that the accused's confession would mitigate the severity of the charges.[38] In making its determination, the Trial Chamber noted that any statements obtained by oppressive conduct undermined the integrity of the proceedings.[39] In *Prosecutor v. Kordić*, however, evidence obtained by eavesdropping on an enemy's telephone calls in a time of war did not damage the integrity of the proceedings and was thus admissible at trial.[40]

3. Cross-Examination of Witnesses

The *Rules* expressly guarantee litigants the right to cross-examine witnesses.[41] The sequence of witness examinations in ICTY proceedings parallels the system used in common law courts: the prosecution presents its witnesses and engages in direct examination, after which the defense counsel may cross-examine the witnesses.[42] Notably, the subject matter on cross-examination is limited to the evidence-in-chief and matters substantially affecting the credibility of witnesses.[43]

Mrkšić, Case No. IT-95–13/1-T, Prosecution's Response to the Joint Defense Submission in Respect of the Prosecution's Request for the Use of the Statements of the Accused Given Before National Organs in the Course of those Proceedings, ¶ 15 (Sept. 15, 2006) [hereinafter *Mrkšić* Brief for the Prosecution].

[35] Case No. IT-99–36-T, Decision on the Defence "Objection to Intercept Evidence," ¶ 54 (Oct. 3, 2003).

[36] *See* R. P. & Evid., *supra* note 16, at 95 (Exclusion of Certain Evidence).

[37] *See* Case No. IT-96–21, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence (Sept. 2, 1997).

[38] *Id.* ¶¶ 13–15.

[39] *See id.* ¶ 41.

[40] Case No. IT-95–14/2-T, Oral Decision of Feb. 2, 2000, *quoted in Brdjanin,* Case No. IT-99–36-T, Decision on the Defence "Objection to Intercept Evidence," n.23.

[41] R. P. & Evid., *supra* note 16, at 90(H)(i) (Testimony of Witnesses).

[42] *See First Annual Report*, *supra* note 15, ¶ 65; *see also* Scharf, *supra* note 9, at 69 (explaining the procedure followed by the ICTY during trials).

[43] R. P. & Evid., *supra* note 16, at 90(H)(i) (Testimony of Witnesses).

The right to cross-examination is traditionally linked to preserving the right of an accused to confront witnesses testifying against him.[44] Recent decisions by the Trial Chambers, however, note that both the prosecution and the defense must have the right to engage in effective cross-examination to ensure a fair trial.[45] For example, in *Prosecutor v. Blaskic,* the defense provided the prosecution with only pseudonyms representing two key witnesses and refused to provide any additional information until the moment the witnesses appeared to testify.[46] The defense counsel sought to insulate these witnesses from outside pressure.[47] In finding for the prosecution, the Trial Chamber concluded that this withholding of information interfered with the prosecution's right to effective cross-examination of defense witnesses.[48] The Trial Chamber, therefore, ordered defense counsel to provide the prosecution with the witnesses' full names and summaries of the facts to which each would testify two days before the scheduled testimony.[49]

II. Discussion

The right to cross-examine a witness regarding his or her credibility must include the right to present prior inconsistent statements to a witness if, during live testimony, the witness changes his or her story.[50] The prosecutor's ability to introduce this form of impeachment evidence, however, is not explicitly guaranteed in the *Rules* and, therefore, is left entirely to the discretion of each Trial Chamber.[51]

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[44] *See generally* Stefano Maffei, The European Right to Confrontation in Criminal Proceedings (2006) (concluding that confrontation of adverse witnesses is a fundamental right of accused after tracing development of right in English, Italian, and French criminal procedure).

[45] Prosecutor v. Blaskic, Case No. IT-95–14, Decision on the Defence Motion for Protective Measures for Witnesses D/H and D/I, ¶ 10 (Sept. 25, 1998) ("CONSIDERING that, in view of establishing the truth, this principle requires that there be no excessive infringement on the rights of the Prosecution, *inter alia* the right to conduct an effective cross-examination of the Defence witnesses.").

[46] *Id.* ¶ 8.

[47] *Id.*

[48] *See id.* ¶¶ 10, 14.

[49] *Id.* ¶ 14.

[50] *See* R. P. & Evid., *supra* note 16, at 90(H)(i) (Testimony of Witnesses) (granting litigants the right to cross-examine on matters affecting the credibility of witnesses).

[51] *Compare* Prosecutor v. Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 33 (Oct. 9, 2006) (allowing impeachment by prior inconsistent statements), *with* Prosecutor v. Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, ¶ 8 (Mar. 11, 2003) (refusing to allow impeachment by prior inconsistent statements).

A. *Use of Impeachment Evidence Before the ICTY*

1. Impeachment Evidence in *Prosecutor v. Simić*

For more than three years, Blagoje Simić, Miroslav Tadić, and Simo Zarić, together with the Serbian military, wreaked havoc on the municipality of Bosanski Samac.[52] Under their "campaign of terror," Bosnian Muslims and Croats were required to work at forced labor projects; expelled, through force and intimidation, from their homes; or sent to detention camps where prisoners were killed, beaten, and sexually assaulted.[53] By the end of the conflict, the Muslim and Croat populations had dwindled from 17,000 in 1991 to less than 300 in 1995.[54] These actions constituted crimes against humanity and contravened the 1949 Geneva Conventions, leading the ICTY Office of the Prosecutor to indict all three men in 1995.[55]

At trial, a novel issue of international evidentiary law emerged regarding the use of a witness's prior inconsistent statements to impeach his testimony.[56] The prosecutor had conducted three telephone interviews with Tadić in 1996.[57] When Tadić's live testimony conflicted with his interview statements, the prosecution sought to cross-examine him regarding these inconsistencies.[58] To prevent the admission of these statements, the defense argued that, at the time of the interviews, the accused was not fully aware of the nature and cause of the charges against him.[59] These statements were therefore obtained in violation of the accused's rights under the *Rules*.[60] The prosecution urged the Trial Chamber to adopt the logic of *Harris v. New York,* a seminal U.S. deci-

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[52] *See* Prosecutor v. Simić, Case No. IT-95–9, Fifth Amended Indictment, ¶¶ 11–33 (May 30, 2002) [hereinafter *Simić* Fifth Amended Indictment].

[53] Prosecutor v. Simić, Case No. IT-95–9, Indictment, ¶¶ 4–5 (July 21, 1995).

[54] *Id.* ¶ 1.

[55] *Id.* ¶ 34.

[56] *See Simić,* Case No. IT-95–9-T, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, ¶ 2.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *See* R. P. & Evid., *supra* note 16, at 42 (Rights of Suspect During Investigation) ("(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect understands: (i) the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it; (ii) the right to have the free assistance of an interpreter if the suspect cannot understand or speak the language to be used for questioning; and (iii) the right to remain silent, and to be cautioned that any statement the suspect makes shall be recorded and may be used in evidence.").

sion, which allows evidence obtained in violation of a defendant's constitutional rights to be used for impeachment purposes.[61]

Trial Chamber II refused to admit these statements because admission would impede the ICTY's mission to afford the accused a fair trial.[62] First, the Trial Chamber feared that impeaching the accused's credibility would affect issues of criminal responsibility.[63] Second, the *Rules*' procedural safeguards were designed to preserve the accused's privilege against self-incrimination.[64] When Tadić consented to these telephone interviews, the prosecutor had not yet served the indictment against him and, therefore, he was not aware of his privilege against self-incrimination.[65] The Trial Chamber also feared that the use of these statements—even for impeachment purposes—would condone the prosecutor's misconduct.[66] The *Rules* also confer the right to appear as a witness in one's own defense.[67] The Trial Chamber reasoned that, if these statements undermined the accused's credibility at trial, the accused could no longer assist in his own defense.[68]

The Trial Chamber refused to adopt the U.S. approach to impeachment evidence because of a factual difference between *Harris* and *Simić*.[69] To the Trial Chamber, a crucial difference was that the defendant in *Harris* gave his statement before being indicted, whereas Tadić made a statement without fully being informed of the charges against him.[70]

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[61] *Simić*, Case No. IT-95–9-T, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, ¶ 1.

[62] *See id.* ¶ 8 (concluding that "it is improper to allow the use of such evidence even for the purposes of impeaching the credibility of the accused, doing so would not be in accordance with principles of fundamental justice"); *see also* ICTY Statute, *supra* note 6, art. 20(1) (ensuring defendants the right to fair and expeditious trial).

[63] *Simić,* Case No. IT-95–9-T, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, ¶ 8.

[64] *Id.* ¶ 6; *see also* ICTY Statute, *supra* note 6, art. 21(4)(g) (stating that accused shall "not to be compelled to testify against himself or to confess guilt").

[65] *See Simić,* Case No. IT-95–9-T, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, ¶ 8.

[66] *See id.*

[67] R. P. & Evid., *supra* note 16, at 85(C) (Presentation of Evidence).

[68] *Simić,* Case No. IT-95–9-T, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, ¶ 7.

[69] *Id.* ¶ 4.

[70] *Id.*

2. Impeachment Evidence in *Prosecutor v. Mrkšić*

Mile Mrkšić, a former Colonel in the Yugoslav People's Army (JNA), along with his subordinates Miroslav Radić and Veselin Šljivančanin, were indicted for orchestrating the Vukovar massacre.[71] On November 19, 1991, JNA soldiers transferred approximately 400 non-Serbs from the Vukovar Hospital to a farm in Ovcara.[72] These ill patients were beaten for several hours before being led to a field to be executed and buried in a mass grave.[73]

Just as in *Simić,* Trial Chamber II faced the question as to whether the prosecution, during cross-examination, should be allowed to introduce the accuseds' prior inconsistent statements in order to challenge their credibility and the credibility of other defense witnesses.[74] Mrkšić and the other defendants had been questioned by the authorities of the former Yugoslavia in Belgrade in 1998.[75] Defense counsel passionately argued that these statements were inadmissible because this questioning was done in violation of the procedural safeguards laid out in Rule 37(B).[76] Under the *Rules,* investigatory power may be wielded only by the Office of the Prosecutor and those acting under its discretion.[77] The statements at issue were taken by the Serbian military security organ or the Military Investigating Judge at the instigation of the Military Prosecutor in Belgrade—an entity distinct from the ICTY.[78]

Over the defense's objections, the Trial Chamber admitted the defendants' 1998 statements solely for the purpose of cross-examination and testing the credibility of the witnesses' testimony.[79] This decision rested on several considerations including: the statements were obtained in accordance with Serbian domestic law;[80] there was no

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[71] Prosecutor v. Mrkšić, Case No. IT-95–13/1, Second Amended Indictment, ¶¶ 18–29 (Aug. 28, 2002).

[72] *Id.* ¶ 22.

[73] Tamara Kovacevic, *Profile: The 'Vukovar Three,'* BBC NEWS, Mar. 9, 2004, http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/1937767.stm.

[74] Prosecutor v. Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 30 (Oct. 9, 2006).

[75] *Id.* ¶ 15.

[76] *Id.* ¶¶ 11–13.

[77] *See* R. P. & EVID., *supra* note 16, at 37(B) (Functions of the Prosecutor) ("The Prosecutor's powers and duties under the Rules may be exercised by staff members of the Office of the Prosecutor authorised by the Prosecutor, or by any person acting under the Prosecutor's discretion.").

[78] *Mrkšić,* Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 15.

[79] *Id.* ¶ 33.

[80] *Id.* ¶ 17.

suggestion that the accuseds' wills were overborne or influenced by coercion, inducement, or other impropriety;[81] and the 1998 statements were obtained much closer in time to the actual events than the statements given at trial in 2006.[82] Judge Parker, moreover, concluded that

> the integrity of the proceedings could be open to greater threat if an Accused was not tested in cross-examination about an earlier account he had given which was materially inconsistent with his evidence given in the trial. That is so whether, for example, the inconsistency is explicable by confusion or lapse of memory given the years since the events, or to deliberate falsity of the evidence given at trial. . . . In the latter case, the Trial Chamber may be misled by perjury concerning a material matter.[83]

Judge Parker also noted that allowing impeachment of a witness would unearth evidence of substantial probative value regarding the credibility of all evidence given by the witness.[84] Discovery of additional probative information furthers the ICTY's mission to ensure a fair trial.[85]

Although the Trial Chamber admitted these 1998 statements to impeach the declarant, the Trial Chamber refused to admit these statements to challenge the testimony of other defense witnesses.[86] To impeach a witness with another's prior statements would not yield evidence of significant probative value because no one, except the declarant, would be in a position to explain the inconsistencies.[87]

B. *Use of Impeachment Evidence in the United States*

In U.S. courts, a defendant's credibility may be challenged by prior inconsistent statements, even when the statements are inadmissible as evidence in the prosecution's case-in-chief because of a procedural or

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[81] *Id.* ¶ 28.

[82] *Id.*

[83] *Mrkšić,* Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 31.

[84] *Id.*

[85] *See* ICTY Statute, *supra* note 6, art. 20(1).

[86] *Mrkšić,* Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 37.

[87] *Id.*

constitutional defect.[88] The *Federal Rules of Evidence* govern when the original statement is considered hearsay.[89] The impeachment exception to the exclusionary rule applies when the original statements were obtained in violation of constitutional rights.[90]

1. Impeachment by Hearsay Evidence

Hearsay, including prior inconsistent statements, is generally inadmissible for substantive use in U.S. courts.[91] Rule 801(d)(1)(A) allows for prior inconsistent statements to be used as substantive evidence only when the original statement was given under oath at a prior proceeding or deposition.[92]

The overriding importance of assessing a witness's credibility, however, allows for impeachment by prior inconsistent statements even when the original statement is hearsay.[93] When live testimony contradicts a witness's prior statements, counsel on cross-examination has two options: (1) directly question the testifying witness as to the prior inconsistent statement;[94] or (2) introduce extrinsic evidence, such as written records or another witness, to prove that the testifying witness is lying on the stand.[95] As impeachment evidence may only be used by the factfinder to assess the credibility of a witness, these prior inconsistent statements are admitted with a limiting instruction directing the jury as to the acceptable uses of these statements.[96]

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[88] *See generally* Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence Manual § 12.01 (M. Bender ed., 1997) (providing a general overview of impeachment and rehabilitation of witnesses).

[89] *See* Fed. R. Evid. 613 & 801(d)(1)(A); *see also id.* 801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

[90] *See* James v. Illinois, 493 U.S. 307, 314 (1990); Harris v. New York, 401 U.S. 222, 226 (1971).

[91] *See* Fed. R. Evid. 802.

[92] *Id.* 801(d)(1)(A).

[93] *Id.* 613.

[94] *Id.* 613(a).

[95] *Id.* 613(b).

[96] *See* United States v. Michelson, 335 U.S. 469, 484–85 (1948). For example, the Third Circuit's model jury instruction states:

> You have heard the testimony of certain witnesses *(if only one witness was impeached with a prior inconsistent statement, include name of witness)*. You have also heard that before this trial *(they)(he)(she)* made *(statements)(a statement)* that may be different from *(their)(his)(her)* testimony in this trial. It is up to you to determine whether *(these statements were)(this statement was)* made and whether *(they were)(it was)* different from the witness*(es)*' testimony in this trial. *(These earlier statements were)(This earlier statement was)* brought to your attention only

In a seminal impeachment case, *United States v. Barrett,* the defendant was tried for the theft of a valuable stamp collection from the Cardinal Spellman Museum.[97] At trial, Buzzy Adams, a prosecution witness, testified that the defendant had previously admitted to the theft.[98] Concerned that Adams was lying to cover his own involvement in the robbery, the defense sought to introduce a second witness, a waitress, who overheard Adams state that the defendant had nothing to do with the theft.[99] The trial judge excluded these inconsistent statements, reasoning that the waitress's testimony was nothing more than a hearsay opinion that the defendant was innocent.[100] The First Circuit reversed the conviction for failure to admit these inconsistent statements.[101] As the jury is the "principal judge of the credibility of witnesses," the purpose of prior inconsistent statements is to highlight the "clear incompatibility" between the statements to the factfinder; thus, it is irrelevant whether the testimony is a hearsay opinion.[102]

2. Impeachment by Illegally Obtained Evidence

At the center of U.S. criminal procedure lies the exclusionary rule, which requires the suppression of evidence obtained in violation of a defendant's constitutional rights.[103] Despite the importance of the exclusionary rule, it is a well-established exception—the *Harris* exception—that illegally obtained evidence may still be used to impeach a defendant's live testimony.[104] This exception reflects a balancing of the

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> to help you decide whether to believe the witness*(es)*' testimony here at trial. You cannot use it as proof of the truth of what the witness*(es)* said in the earlier statement*(s)*. You can only use it as one way of evaluating the witness*(es)*' testimony in this trial.

See Third Circuit Criminal Jury Instructions, § 4.22 (Sept. 2006), *available at* http://www.ca3.uscourts.gov/criminaljury/tocandinstructions.htm.

[97] 539 F.2d 244, 245 (1st Cir. 1976).

[98] *Id.* at 254 n.9.

[99] *Id.* at 253–54.

[100] *Id.* at 247.

[101] *Id.* at 254.

[102] *Barrett*, 539 F.2d at 254.

[103] *See* Weeks v. United States, 232 U.S. 883, 889 (1914) (finding that a warrantless confiscation of Week's private letters violated his constitutional rights under Fourth Amendment and, therefore, letters were inadmissible at trial).

[104] *See* Harris v. New York, 401 U.S. 222, 224–26 (1971) ("The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent statements."); Walder v. United States, 347 U.S. 62, 65 (1954) (proclaiming, for the first time, that it would be a perversion of *Weeks* doctrine to allow defendant to "turn the illegal method by which evidence in the Govern-

need to deter unlawful police conduct with both the law's interest in preventing perjury and the jury's need to accurately assess a defendant's credibility.[105]

Harris v. New York held that statements obtained in violation of *Miranda,* although inadmissible in the prosecution's case-in-chief, were admissible to impeach the defendant's live testimony.[106] Viven Harris was tried for twice selling narcotics to an undercover agent.[107] Before being read his *Miranda* rights, Harris admitted to police that he made both sales and that the second transaction involved heroin.[108] At trial, Harris changed his story, denying that he made the first sale and stating that the second sale was only baking powder.[109] The trial court allowed the prosecutor to cross-examine Harris by presenting these otherwise inadmissible statements.[110]

The Court implicitly reasoned that the "speculative possibility" that police misconduct would continue if evidence is used for impeachment purposes was vastly outweighed by both the need to prevent perjury and the jury's need to properly assess the defendant's credibility.[111] Police would continue to avoid blatant violations of constitutional rights because this evidence would be banned from the prosecution's case-in-chief.[112] For these reasons, the Court noted that "there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility."[113] In *United States v. Haven,* the Court slightly expanded the *Harris* exception to allow illegally obtained evidence to impeach a defendant's answers to the prosecutor's questions during cross-examination.[114]

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ment's possession was obtained to his own advantage, and provide himself with a shield against contradictions of his untruths").

[105] Stone v. Powell, 428 U.S. 465, 493–94 (1976); *Harris,* 401 U.S. at 225; *see* Mary Jo White, *The Impeachment Exception to the Constitutional Exclusionary Rule,* 73 Colum. L. Rev. 1476, 1482 (1973).

[106] *See* 401 U.S. at 226.

[107] *Id.* at 222–23.

[108] *See* White, *supra* note 105, at 1481–82 n.43.

[109] *Id.*

[110] Harris v. New York, 401 U.S. 222, 223 (1971).

[111] *See id.* at 225.

[112] *Id.*

[113] *Id.* (quoting Walder v. United States, 347 U.S. 62, 65 (1954)); *see also* United States v. Haven, 446 U.S. 620, 627 (1980) ("The incremental furthering of those ends [deterrence of illegal police conduct] by forbidding impeachment of the defendant who testifies was deemed insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial.").

[114] *See Haven,* 446 U.S. at 627–28.

Although the *Harris* exception allows defendants to be impeached by illegally obtained evidence, *James v. Illinois* held that this evidence could not be used to impeach the testimony of all defense witnesses.[115] In *James,* the prosecution needed to connect the defendant to eyewitness descriptions of a red-headed shooter who left a young boy dead and another seriously injured.[116] Darryl James, once arrested, admitted to dying his hair black and wearing it in its "natural" style, but previously had red hair worn in a slicked-back "butter" style.[117] At trial, a friend of the defendant's family testified that on the day of the shooting the defendant's hair was black and curly.[118] The prosecutor unsuccessfully sought to use James's statement to impeach this friend.[119]

The balance, in this case, tipped against the expansion of the *Harris* exception because allowing the impeachment of all witnesses with illegally obtained evidence would encourage the illicit collection of evidence and decrease the accuracy of the factfinding process.[120] As witnesses are not substantially invested in a trial, a defendant's fate should not be jeopardized due to a witness's inattentiveness.[121] This extension could lead to defense counsel not calling witnesses—who potentially may offer probative evidence—for fear that their inattentiveness would open the door to illegally obtained evidence.[122]

C. *Use of Impeachment Evidence in Civil Law Systems*

In civil law systems, the admissibility of evidence is determined by the trial judge, thus obviating the need to codify many rules of evidence.[123] Yet the importance of using prior inconsistent statements for impeachment purposes has crept into the codes of criminal procedure in several nations, including Germany and Poland.[124]

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[115] *See* James v. Illinois, 493 U.S. 307, 313 (1990).

[116] *Id.* at 309–10.

[117] *See id.* (noting that James's original statements were suppressed as fruit of an unlawful arrest because police lacked probable cause for a warrantless arrest).

[118] *Id.* at 310.

[119] *Id.* at 320.

[120] *James,* 493 U.S. at 313–18. For a detailed analysis of the majority and dissent opinions in *James,* see James L. Kainen, *The Impeachment Exception to the Exclusionary Rules: Policies, Principles, and Politics,* 44 Stan. L. Rev. 1301, 1312–26 (1992).

[121] *James,* 493 U.S. at 315.

[122] *Id.* at 315–16.

[123] *See* Prosecutor v. Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 36 (Oct. 9, 2006).

[124] *See* Strafprozeßordnung [StPO] [Code of Criminal Procedure] Apr. 7, 1987, Bundesgesetzblatt, Teil I [BGBl. I] 1054, § 254 (F.R.G), *available at* http://www.iuscomp.org/gla/statutes/StPO.htm (last visited May 13, 2008); Code of Criminal Procedure, June

German evidentiary law allows for judicial records of the accused's previous statements to be read to the court if the accused's live testimony is contradictory.[125] Furthermore, it is the practice of German courts to allow a witness's prior depositions to be read to the court in order to highlight inconsistencies.[126]

The Polish Code of Criminal Procedure permits the accused's prior statements given during an investigation or other proceeding to be read in court if, at trial, the accused refuses to testify, states that he does not remember certain facts, or offers contradictory testimony.[127] Once read to the court, the presiding judge will request that the accused explain these inconsistencies.[128]

III. Analysis

To resolve the contradictory results of *Mrkšić* and *Simić,* this Note argues that the ICTY should adopt an international equivalent of the United States' Rule 613 and the *Harris* exception to the exclusionary rule.[129] The U.S. approach is clearly compatible with the civil law approach to admission of evidence, as Germany and Poland already possess rules allowing impeachment by prior inconsistent statements.[130] Adoption of the U.S. approach would also allow the ICTY to adhere to its fundamental evidentiary rules.[131]

According to the *Rules,* evidence is admissible so long as its probative value is not outweighed by the need to ensure a fair trial.[132] Impeachment by prior inconsistent statements unearths evidence of substantial probative value regarding the credibility of a witness's live

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6, 1997, art. 389, §§ 1–2 (Pol.), *available at* http://www.era.int/domains/corpus-juris/public_pdf/polish_ccp.pdf (last visited May 12, 2008).

[125] *See* StPO § 254(2).

[126] *See* Comparative Criminal Procedure 132 (John Hatchard et al. eds., 1996).

[127] Code of Criminal Procedure art. 389, § 1.

[128] *Id.* § 2.

[129] *See* Prosecutor v. Tadic, Case No. IT-91–1, Decision on the Defence Motion on Hearsay, ¶¶ 15–19 (Aug. 7, 1996), *quoted in* Boas, *supra* note 4, at 52. (recognizing that although ICTY is not bound by any particular national code of evidence or criminal procedure, the Tribunal may seek guidance in rules recognized in other prominent legal systems).

[130] *See* StPO § 254; Code of Criminal Procedure art. 389, §§ 1–2.

[131] *See* R. P. & Evid., *supra* note 16, at 89(C)–(D) (General Provisions); *see also* Prosecutor v. Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 25 (Oct. 9, 2006) (recognizing that while *Rules* deal with *admission* of evidence, underlying policies "provide a useful and appropriate guide to the determination of the procedure to be followed as to the use of a statement solely for the purposes of cross-examination").

[132] *See* R. P. & Evid., *supra* note 16, at 89(C)–(D) (General Provisions).

testimony.[133] Allowing impeachment would also further the ICTY's commitment to conducting fair trials because fair trials occur only when a balance is struck between the need to find the truth and the need to preserve the rights of the accused.[134]

A. *Uncovering the Truth Through the U.S. Approach*

Impeachment of a witness's credibility by presentation of prior inconsistent statements is a vital tool for the factfinder in evaluating the evidence presented at trial.[135] The value of testimonial evidence depends on a witness's "opportunity to observe and his capacity to observe accurately, to remember, and to communicate in such a way that triers of fact may know what actually happened."[136] If factfinders are to base life-altering decisions on the information communicated by witnesses, it is imperative that they discover whether a witness is worthy of their trust.[137]

By presenting the prior inconsistent statements to a witness, the prosecutor successfully highlights the "clear incompatibility" between the statements to the factfinder.[138] Questioning during cross-examination also affords a witness an opportunity to explain the inconsistencies, proving that the live testimony is truthful and reliable.[139] With both sides of the story, the factfinder may choose to trust a witness, discredit a witness who is so unreliable as to contradict himself,[140] or infer that if a witness is mistaken as to one fact, perhaps he is mistaken as to other crucial facts.[141]

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[133] *See* Prosecutor v. Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 31 (Oct. 9, 2006).

[134] *See id.* ¶ 26 (noting that question is whether probative value of impeachment evidence substantially outweighs need to ensure fair trial); *see also* Harris v. New York, 401 U.S. 222, 225 (1971) (concluding that the need to prevent perjury and allow jurors to assess credibility outweighed any threat of police misconduct).

[135] *See* Randolph N. Jonakait, The American Jury System 51 (2003).

[136] Mason Ladd, *Some Observations on Credibility: Impeachment of Witnesses,* 52 Cornell L. Rev. 239, 240 (1967). The Advisory Committee relied on this foundational report—discussing the need for clear evidentiary rules allowing impeachment by prior inconsistent statements—when crafting *Federal Rules of Evidence. See* Fed. R. Evid. 613 advisory committee's note.

[137] *See* Fed. R. Evid. 613 advisory committee's note; Ladd, *supra* note 136, at 240.

[138] *See* United States v. Barrett, 539 F.2d 244, 254 (1st Cir. 1976).

[139] *See Mrkšić,* Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 32.

[140] Weinstein & Berger, *supra* note 88, § 12.01[5].

[141] *Id.* § 12.01[4]. The maxim *falsus in uno, falsus in omnibus,* meaning false in one thing, false in everything, is a notion deeply rooted in common law jurisprudence. *See* United States

The *Simić* Trial Chamber failed in its role as the principal judge of a witness's credibility when it refused to allow the prosecution to present Tadić's telephone interviews.[142] In retrospect, no one will ever know whether Tadić's telephone interviews or live testimony recounted an accurate version of the atrocities that occurred in Bosanski Samac.[143] Denying the prosecution the ability to present his prior inconsistent statements, however, withheld valuable information regarding Tadić's character and veracity from the Trial Chamber.[144] In *Mrkšić,* on the other hand, the admission of the 1998 statements gave the Trial Chamber the opportunity to evaluate the accused's credibility and independently decide whether to credit the live testimony.[145]

B. *Preserving the Rights of the Accused Through the U.S. Approach*

Experience under the U.S. approach demonstrates that using prior inconsistent statements for impeachment purposes does not tread on the rights of the accused.[146] First, restricting the use of prior inconsistent statements to impeachment purposes ensures that an accused will never be convicted based solely on hearsay or illegally obtained evidence.[147] Courts fear that questionable evidence will affect determinations of criminal responsibility by being used to meet the prosecution's burden of proof.[148] For example, the *Harris* Court cautioned that a defendant cannot be convicted based on statements obtained without *Miranda* warnings because the defendant would be unaware of his right

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v. Castillero, 67 U.S. (2 Black) 17, 129 (1862); Siewe v. Gonzalez, 480 F.3d 160, 170 (2d. Cir. 2007).

[142] *See* Prosecutor v. Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, ¶ 8 (Mar. 11, 2003); *see also Barrett,* 539 F.2d at 254 (finding trial court erred in excluding impeachment evidence because of importance of assessing witness's credibility).

[143] *See Simić,* Case No. IT-95–9-T, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, ¶ 2.

[144] *See id.* ¶ 8.

[145] *See Mrkšić,* Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 33.

[146] *Id.* ¶ 34.

[147] *See* Walder v. United States, 347 U.S. 62, 65 (1954) ("[T]he Government cannot make an affirmative use of evidence unlawfully obtained."); *Mrkšić,* Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 29 ("[T]he Chamber would not have allowed the admission of any of these Statements as substantive evidence, had the prosecution sought to rely on it.").

[148] *See Simić,* Case No. IT-95–9-T, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, ¶ 8; Kainen, *supra* note 120, at 1352.

to counsel or privilege against self-incrimination.[149] The *Mrkšić* Trial Chamber similarly warned that the accused should not risk conviction based on questioning that failed to observe the procedural requirements of the *Rules*.[150]

This proposed international evidence rule leaves the *Rules'* procedural safeguards intact while simultaneously allowing prosecutors to draw the accused's inconsistencies to the attention of the Trial Chamber.[151] The *Harris* exception was originally "fashioned to prevent defendants from using unfair trial tactics—lying for their own benefit while the Government stood by helplessly, unable to use unconstitutionally obtained probative evidence that could expose the lies."[152] Under U.S. law, the Constitution cannot shield a defendant from his own prior statements; similarly, the *Rules* should no longer be allowed to shield the accused as in *Simić*.[153]

ICTY judges, through careful drafting, could form a rule that incorporates the *James* limitation, thus adhering to the *Rules*' exclusion of evidence when its probative value is outweighed by the need to ensure a fair trial.[154] Rule 613 concludes that *any* witness may be impeached by their *own* prior statements.[155] The *James* limitation recognizes that a defendant's statements can only impeach the declarant defendant, not other witnesses.[156] The normative basis of these two propositions is that a witness should always be aware of his or her own prior statements.[157] As recognized by the *James* Court, cross-examination of a witness by ref-

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[149] *See* Harris v. New York, 401 U.S. 222, 224 (1971) ("*Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes.").

[150] *See Mrkšić,* Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 29.

[151] *See Mrkšić* Brief for the Prosecution, *supra* note 34, ¶ 10.

[152] White, *supra* note 105, at 1497.

[153] *See Harris,* 401 U.S. at 226.

[154] *See* James v. Illinois, 493 U.S. 307, 315–16 (1990); *see also* R. P. & Evid., *supra* note 16, at 89(D) (General Provisions) (guiding Trial Chambers to exclude evidence if necessary to hold fair trial).

[155] Fed. R. Evid. 613.

[156] 493 U.S. at 315–16.

[157] *See* Fed. R. Evid. 613 advisory committee's note. The common law rule regarding impeachment by prior inconsistent statements, derived from *The Queen's Case,* 2 Br. & B. 284, 129 Eng. Rep. 976 (1820), required a witness to be shown a written account of the alleged prior inconsistent statement before counsel could cross-examine regarding the inconsistencies. In Rule 613, the drafters did away with this requirement, implicitly reasoning that witnesses should be aware of their own prior statements and need not be shown the statement in advance. *See id.*

erence to another person's statements is unlikely to reveal information of significant probative value.[158] This type of cross-examination, therefore, would be excluded not just under *James,* but under the ICTY's current *Rules.*[159]

Additionally, trial before a professional factfinder ensures that the accused will not be convicted due to overvaluation of impeachment evidence.[160] Because of the overriding importance of discovering the truth, U.S. courts allow for impeachment by prior inconsistent statements despite the potential overvaluing of this information by lay juries.[161] Jurors' ability to confine evidence to its proper scope, even with a limiting instruction, has been called an "unmitigated fiction"[162] and an impossible feat of "mental gymnastics."[163] Empirical studies confirm that jurors are often unable to follow instructions limiting the use of evidence to a particular purpose.[164]

The ICTY has a stronger incentive to adopt a rule permitting impeachment of witnesses by prior inconsistent statements because professional judges possess the requisite knowledge to afford only the proper weight to hearsay or illegally obtained evidence.[165] Scholars

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[158] *See James,* 493 U.S. at 320.

[159] *See* R. P. & Evid., *supra* note 16, at 89(C)–(D) (General Provisions).

[160] *See* Boas, *supra* note 4, at 55.

[161] *See* White, *supra* note 105, at 1476–77.

[162] Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

[163] Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932); *see also* Kainen, *supra* note 120, at 1352 (noting that courts expect jurors not to "consider any of the affirmative inferences from the perjury that would relieve the prosecution from establishing its burden of proving guilt with lawful evidence").

[164] *See* Jonakait, *supra* note 135, at 202–05. A preeminent study looked at whether jurors obeyed instructions limiting the use of prior conviction evidence to impeachment purposes as required by Rule 609. When jurors did not receive information regarding prior convictions, 42.5% voted to convict. Jurors were then presented with evidence of prior convictions for similar offenses, prior convictions for dissimilar offenses, and prior perjury convictions. Even though jurors were given a limiting instruction, conviction rates skyrocketed to 75.0%, 52.5%, and 60.0% respectively. Researchers concluded that presentation of prior convictions "increase[s] the likelihood of conviction, and that the judge's limiting instructions do not appear to correct that error." *See* Roselle L. Wissler & Michael Saks, *On the Inefficacy of Limiting Instruction: When Jurors Use Prior Conviction Evidence to Decide on Guilt,* 9 L. & Hum. Behav. 37, 43, & 47 (1985).

[165] *See* Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding,* 153 U. Pa. L. Rev. 1251, 1319–21 (2005). One study found that judges in bench trials were able to disregard coerced confessions obtained in violation of *Miranda*'s guarantee of a right to counsel. When judges were not told about the defendant's coerced confession, 17.7% convicted the defendant. When judges were told about the defendant's coerced confession, just 20.7% chose to convict the defendant. Researchers concluded that "judges were able to uphold the policies underlying the *Miranda* doctrine and ignore incriminating but inadmissible evidence." *Id.*

have noted that the presence of professional factfinders is precisely the reason why hearsay and other troublesome evidence are admissible before the ICTY.[166] Quite simply, ICTY trials are "unencumbered by the usual concern of unduly prejudicing non-judicial minds in the trying of criminal cases."[167] Admission of impeachment evidence, therefore, is warranted at the ICTY because it would give the judge a better understanding of the witness's credibility without the risk of the evidence being used substantively.[168]

Third, the explicit exclusion of illegally obtained statements from the prosecution's case-in-chief ensures that prosecutors respect the procedural guidelines of the *Rules*.[169] The *Simić* Trial Chamber's fear that admission of prior statements would "condone" violation of the rules was allayed by the U.S. Supreme Court in *Harris*.[170] There, the Court noted sufficient deterrence of police misconduct stems from the exclusion of these illegally obtained statements from substantive use.[171] Essentially, there is no incentive to violate procedural and constitutional guidelines if the evidence cannot be used at trial.[172] Even less incentive exists in ICTY cases because investigations are directed entirely by prosecutors because the ICTY has no law enforcement branch.[173] Prosecutors, therefore, will have an even greater appreciation for the risks of violating the *Rules* because of the detrimental effect on their own cases.[174]

Finally, potential impeachment by prior inconsistent statements does not interfere with the free exercise of the accused's right to testify in his own defense—a fear of the *Simić* Trial Chamber.[175] This right is guaranteed under both the *Rules* and U.S. law.[176] Impeachment simply

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[166] *See* Boas, *supra* note 4, at 55; *see also* May & Wierda, *supra* note 17, at 747 (explaining that ICTY judges are able to hear hearsay and other controversial evidence in context in which it was obtained and afford it proper weight).

[167] Boas, *supra* note 4, at 55.

[168] *See id.*

[169] *See* Harris v. New York, 401 U.S. 222, 225 (1971).

[170] *See id.*; Prosecutor v. Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, ¶ 8 (Mar. 11, 2003).

[171] *See Harris,* 401 U.S. at 225.

[172] *See id.* (explicitly reasoning that "sufficient deterrence follows when the evidence in question is made unavailable to the prosecution in its case in chief").

[173] Carla Del Ponte, *Investigation and Prosecution of Large-Scale Crimes at the International Level: The Experience of the ICTY,* 4 J. Int'l Crim. Just. 539, 552 (2006).

[174] *See Harris,* 401 U.S. at 225.

[175] *See Simić,* Case No. IT-95–9-T, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, ¶ 7.

[176] R. P. & Evid., *supra* note 16, at 85(C) (General Provisions); *In re* Oliver, 333 U.S. 257, 273 (1948) (expounding that "[a] person's right to reasonable notice of a charge

ensures that when the accused elects to testify, he or she speaks truthfully.[177] Essentially, this right to testify "cannot be construed to include the right to commit perjury."[178]

C. *Practical Benefits of the U.S. Approach*

In ICTY trials, the lack of contemporaneous evidence presents a tactical problem for prosecutors.[179] Contemporaneous evidence carries more weight at trial because it was obtained or recorded while the criminal events were transpiring.[180] Adoption of the U.S. approach to prior inconsistent statements would take prosecutors one step closer to overcoming this evidentiary hurdle.[181]

Most crimes being tried before the ICTY occurred before the ICTY was even established; therefore, prosecutors are faced with piecing together evidence years after the crimes occurred.[182] Wiretapping and surveillance—which are two of the most common investigatory tools—are unavailable to ICTY prosecutors.[183] Documentary evidence is also scarce because, as one former ICTY prosecutor noted, "Senior leaders orchestrating large-scale crimes rarely document the overall criminal purpose or detail each criminal step of its implementation."[184]

In the absence of these fact-gathering tools, live testimony is the primary tool for presenting facts to the Trial Chamber.[185] As the value of testimonial evidence depends on a witness's ability to remember and relate certain events, the prosecutor should be able to check the accu-

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against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel").

[177] *See* R. P. & Evid., *supra* note 16, at 90(A) (Testimony of Witnesses) (requiring that all witnesses abide by the oath and solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth").

[178] *Harris*, 401 U.S. at 225.

[179] Del Ponte, *supra* note 173, at 553–55.

[180] *Cf.* Hagen v. Utah, 510 U.S. 399, 420 (1994) (discussing value of contemporaneous evidence in questions of statutory interpretation).

[181] *See* Fed. R. Evid. 613; *Harris,* 401 U.S. at 226.

[182] Del Ponte, *supra* note 173, at 551–52.

[183] *See id.* at 552; *see also* Admin. Office of the U.S. Courts, Report of the Director of the Administrative Office of United States Courts on Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications 5 (2006), *available at* http://www.uscourts.gov/wiretap05/WTText.pdf (noting that in 2005, 1773 wiretap applications were authorized in the United States).

[184] Del Ponte, *supra* note 173, at 553.

[185] *See id.* at 551–53 (implicitly recognizing that, in the absence of wiretapping, surveillance, and documentary evidence, the primary source of information remaining is live witnesses).

racy of trial testimony against statements given closer in time to the underlying event.[186] For example, the *Simić* case involved alleged crimes occurring between September 1991 and December 1993.[187] The telephone interviews at issue were conducted in 1996.[188] Tadić's trial testimony, however, did not take place until 2003.[189] Because of the frailty of human memory, statements given two years after an event are more credible than statements given ten years after an event.[190] Even though prior statements may not be used substantively, assessment of a witness's credibility is crucial in the factfinder's evaluation of testimonial evidence.[191]

The absence of detailed evidentiary rules, moreover, leaves prosecutors guessing as to which pieces of their limited evidentiary arsenal can be used at trial.[192] Each Trial Chamber is allowed to independently "apply the procedure according to its own understanding of the purpose and underlying principles of the procedure."[193] As previously discussed, the U.S. approach is consistent with the ICTY's principles governing the admissibility of evidence, namely that evidence is admissible so long as its probative value is not outweighed by the need to ensure a fair trial.[194] Codification of a clear rule regarding prior inconsistent statements would prevent conflicting interpretations of policy and provide concrete guidelines for prosecutors.[195]

As the ICTY seeks to provide expeditious trials, adoption of the U.S. approach would obviate the need for case-by-case evidentiary deci-

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[186] *See* Ladd, *supra* note 136, at 240; *see also* Prosecutor v. Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 28 (Oct. 9, 2006) (noting extensive time delay between challenged statements and trial testimony of accused can extend up to fifteen years).

[187] *Simić* Fifth Amended Indictment, *supra* note 52, ¶ 11.

[188] Prosecutor v. Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, ¶ 2 (Mar. 11, 2003).

[189] *Id.*

[190] *See generally* Yaacov Trope & Nira Liberman, *Temporal Construal,* 110 Psychol. R. 403, 418 (2003) (finding that memories of events change over time and, as time passes, individuals will likely perceive events in abstract features, not concrete details).

[191] *Mrkšić,* Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 33.

[192] *See* Patrick L. Robinson, *Rough Edges in the Alignment of the Legal Systems in the Proceedings at the ICTY,* 3 J. Int'l Crim. Just. 1037, 1056–57 (2005).

[193] *Id.* at 1057.

[194] *See supra* notes 132–34 and accompanying text.

[195] *Compare Mrkšić,* Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 33 (allowing prior inconsistent statements to be used for impeachment), *with* Prosecutor v. Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, ¶ 8 (Mar. 11, 2003) (disallowing prior inconsistent statements to be used for impeachment).

sions and speed up the pace of war crimes trials.[196] In *Mrkšić,* for example, the trial was delayed for a month because the Trial Chamber needed to decide whether the 1998 statements were admissible.[197]

Conclusion

International criminal tribunals are bound to play an increasingly important role in the future. The need to establish clear functional rules of evidence is paramount to ensuring that these criminal trials remain fair proceedings for both the prosecution and defense. Currently, the ICTY's *Rules,* with all their virtues and flaws, have been virtually duplicated by the International Criminal Tribunal for Rwanda and the International Criminal Court. As a result, the debate regarding the use of prior inconsistent statements for impeachment purposes will remain part of the international legal landscape until one tribunal ends the debate by establishing a clear evidentiary rule allowing the admission of these statements.

The ICTY, as the original international criminal tribunal, stands in a position to remedy this problem, once and for all, by adopting an international equivalent to Rule 613 and the *Harris* exception. The Trial Chambers have already accepted the logic underlying the U.S. evidentiary rule. Now it is time for the ICTY to explicitly adopt a similar rule and prevent future witnesses from weaving a web of lies on the stand.

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[196] *See, e.g., Mrkšić,* Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 33.

[197] *Id.* The defense filed a motion requesting the exclusion of the 1998 statements on September 7, 2006. The Trial Chamber did not resolve the issue until October 9, 2006. *Id.*